(18)

No. 98-208

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF *AMICUS CURIAE* FOR THE RUTHERFORD INSTITUTE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby respectfully moves the Honorable Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Respondents has been obtained. The consent of counsel for the Petitioners has been requested and refused.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated

with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including recent gender discrimination cases *Burlington Industries, Inc. v. Ellerth*, Sup.Ct. No. 97-569 (October Term 1997) and *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred and ninety cases nationally in various trial and appellate courts, including numerous employment discrimination actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* The Institute has published educational materials and taught continuing legal education classes in this area as well.[1]

The Rutherford Institute is submitting a brief *amicus curiae* in support of neither party, insofar as it does not believe this Court should adopt the standard of liability enunciated by

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[1] John W. Whitehead, Founder and President of the Institute, has published several dozen books and articles on constitutional and civil rights issues, *e.g.*, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992), and *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

either the Petitioner or the Respondent. Instead, the Institute's brief urges the Court to adopt the standard first established by the Dissent in the Court of Appeals.

In light of the important issues being raised in this case, the Institute respectfully requests that its arguments be heard.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

I. What level of discriminatory treatment is necessary to trigger the punitive damages provisions of the 1991 Civil Rights Act, 42 U.S.C. §1981a(b)(1)?

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[2]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including recent gender discrimination cases *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred and ninety cases nationally in various trial and appellate courts, including numerous employment discrimination actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e *et seq.* The Institute has published educational materials and taught continuing legal education classes in this area as well.[3]

[2] *Amicus curiae* The Rutherford Institute files this brief upon leave of Court. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Heather Price (*J.D.* 1999, Pepperdine Law School.) No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

This Court, in hearing the instant case, has the opportunity to settle a significant dispute among the federal circuits as to what standard is to be applied to discriminatory conduct in determining whether to send the question of punitive damages to the jury in a civil rights case. This question is one of the most critical to arise out of the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. §2000e. In this brief, The Rutherford Institute seeks to demonstrate that the standard of punitive liability enunciated by the *en banc* Circuit Court dissent[4] is most in accord with the legislative intent evidenced by the ordinary understanding of the words of the statute, the legislative history of the statute, and the structure of employer liability under Title VII of the 1964 Civil Rights Act.

The 1991 Civil Rights Act provides for an award of punitive damages in cases of "a discriminatory practice or

[3] John W. Whitehead, Founder and President of the Institute, has published several dozen books and articles on constitutional and civil rights issues, *e.g.*, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992), and *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

[4] *Kolstad v. American Dental Association*, 139 F.3d 958, 970-79 (D.C. Cir. 1998) (Dissenting opinion by Tatel, C.J.).

discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. §1981a(b)(1). The Circuit Court majority held that this language necessitated a level of conduct toward the aggrieved party that was "egregious". Under the language of §1981a(b)(1), such a definition may include "malice," but it would exclude most shades of "reckless indifference," thereby ignoring a significant element of the statutory standard. Further, the *en banc* Circuit Court majority sought to apply the definitions and analytical framework of criminal law to a private civil action. In so doing, the court ignored the canon that remedial statutes are to be construed liberally. *See* House Report No. 102-40(I) §209 at 87. Finally, the majority's egregiousness requirement is at odds with the structure of liability set out in Title VII, which imputes liability to employers for disparate treatment and for certain types of sexual harassment regardless of the employer's actual knowledge of an employee's wrongful conduct. Only a standard which imparts compensatory damages liability to employers, but permits an award of punitive damages only where the agency relationship between the employer and the offending employee is sufficiently unattenuated, permits §1981a and Title VII to cohere in a logical and workable fashion. Such a standard was articulated in the Circuit Court's dissenting opinion, which should be adopted by this Court.

III. ARGUMENT

A. THE SUPREME COURT SHOULD DECLINE TO ADOPT THE STANDARD ENUNCIATED BY THE *EN BANC* CIRCUIT COURT MAJORITY AS CONTRARY TO THE LANGUAGE AND INTENT OF THE 1991 CIVIL RIGHTS ACT (42 U.S.C. §1981a(b)(2))

1. The Language of the Act is Clear, and Specifies a Standard for Punitive Damages Well Below the *En Banc* Circuit Court Majority's "Egregious" Standard.

In passing the bill that was to become 42 U.S.C. 1981a(b)(2) into law, Congress employed terminology that required a showing of discriminatory practices with "malice or reckless indifference to the federally protected rights of an aggrieved individual." Although the term "egregious" and its import were then extant in federal statutes and case law, *e.g.*, *Smith v. Wade*, 461 U.S. 30 (1983), and Congress was acutely aware of the case law interpreting damages provisions in civil rights laws while considering enactment of §1981a, *see* House Report No. 102-40(I) at 64, 65, Congress declined to use the term to define the level of misconduct required to impose punitive damages under the Act. Insofar as 42 U.S.C. §1981a is one of the only civil rights statutes to expressly provide for punitive damages and to define the standards for the award of such damages, it was improper for the Circuit Court to view the claims arising under this act through the same interpretive lens that was used to construe punitive damages provisions under the civil rights laws in prior cases. As the dissent in the Court of Appeals observed, the "reckless indifference" standard used in the statute is unambiguous and may not be ignored:

> [b]ecause this court's duty is to"give effect, if possible, to every clause and word of [the] statute," . . . we may not ignore the reckless indifference standard, but must interpret it as written by Congress.

Kolstad, 139 F.3d at 973, quoting *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997). *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 938-40 (1998).

Unfortunately, the Circuit Court's application of an "egregiousness" standard does exactly that.

In this case, clear instruction is given by the statute itself as to the meaning and availability of punitive damages for violations of §1981a. *See* 42 U.S.C. §1981a (b)(1). A canon of statutory construction holds that, in borrowing terms of art, Congress presumably adopts also the ideas attached to each word and its meaning, unless otherwise instructed. *See Molzof v. United States*, 502 U.S. 301, 307 (1992), *quoting Morissette v. United States*, 342 U.S. 246, 263 (1952). An examination of the ordinary meanings of the terms "malice" and "reckless indifference" demonstrates that the meaning of the words Congress chose to convey the quantum of sanctionable conduct required to allow a jury to determine punitive damages is significantly different from the meaning of the term "egregious" adopted by the Circuit Court majority.

As a requirement to sustain an award of punitive damages, "malice" is a wrongful act done intentionally without just cause or excuse. *Malix v. Apex Intern. Alloys Inc.*, 762 F.2d 77, 80 (10th Cir. 1985). Simply put, malice may be one component of egregiousness but does not in itself imply the full range of evils encompassed by the latter term. *See, e.g., BMW v. Gore*, 517 U.S. 559, 568 (1996). Somewhat lower on the continuum of intent, but higher than negligence, "reckless" is defined as

> Careless, heedless, inattentive; indifferent to consequences.... Conduct must be such as to evince disregard of, or indifference to, consequences, although no harm was intended.

Black's Law Dictionary (6th ed., West Publishing 1990) at 1270. To be "indifferent" is to be "impartial" or "disinterested." *Black's Law Dictionary, supra,* at 773. The phrase "reckless indifference" therefore suggests a knowing state of disregard for the rights of others, a significantly less blameworthy state of culpability on the part of a defendant even than maliciousness.

Suggesting that a jury must find punitive damages only for "egregious" behavior rather than behavior exhibiting malice or reckless indifference can serve only to unduly restrict the range of meaning intended by the statute. "Egregious" is commonly defined as "conspicuously bad or offensive", synonymous with "flagrant," meaning "conspicuously bad, offensive, or reprehensible." *American Heritage Dictionary* (3d ed., Houghton Mifflin 1992) at 589, 689. This Court has consistently interpreted the term in a similar fashion. *See, e.g., County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998) and *BMW v. Gore*, 517 U.S. 559 (1996). For example, in *Sacramento v. Lewis*, the Court in last year's term reviewed the "egregiousness" standard for Fourteenth Amendment violations pursued under 42 U.S.C. §1983. The Court reiterated that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" hence subject to damages liability. *Lewis*, 118 S. Ct. at 1716, quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992). The Court distinguished "egregious" conduct, which it equated to the standard "shocking to the conscience," as a higher standard than common law notions of heightened tort liability:

> It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather

> points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.

Lewis, 118 S. Ct. at 1717. In so doing, the Court expressed its view that the "egregious" standard exceeds the common law tort standards employed by Section 1981a of "malice" and "reckless indifference." To impose this higher standard, then, would certainly frustrate the clearly expressed intent of Congress.[5]

2. The Circuit Court Majority's View is Inconsistent With the Legislative History of the Civil Rights Act of 1991

The Circuit Court majority relied heavily on its interpretation of the legislative history of the 1991 Civil Rights Act. There is much within this same legislative history

[5] The Circuit Court relies on the canon of construction *noscitur a sociis*, 'a thing is known by its friends', to suggest that the words malice and reckless indifference have the same meaning as the traditional understanding of punitive damages. *Kolstad*, 139 F.3d at 965, n.4. There is, however, another canon of statutory construction that requires that all the words of a statute be given effect. While the former is a linguistic canon, the latter is a systemic canon, that is, it must be followed if each branch of our government system is to retain its Constitutionalpowers. To allow a court to ignore conspicuous terms of a statute that clearly modify the meaning of another term in the statute is to permit federal courts a level of independence that may lead to confusion and incoherency among courts and practitioners. *See generally* Llewellyn, Karl, *The Common Law Tradition: Citing Appeals*, Little Brown (1960) at 522-528.

to suggest that the Circuit Court dissent's position is more consistent with the view of Congress.[6] Both the report of the House Education and Labor Committee (No. 102-40(I) at 87-88) and the House Judiciary Committee (No. 102-40(II) at 34) make clear that the bill was intended as a remedial statute, and as such should be given a broad construction by the courts in applying it to cases of intentional discrimination. *Id.*

The Circuit Court majority places particular emphasis on the House Report, which suggests that a plaintiff "must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages." House Report No. 40(I) at 72. However, the same House Report in the subsequent paragraph notes that it is the jury that shall in every case make the determination of the appropriate award of punitive damages and the judge shall serve as a check in reducing awards that are clearly inappropriate or insupportable. House Report No. 102-40(I) at 72 ("...juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff

[6] The divining of legislative intent through legislative history, while a somewhat biased and unreliable source of statutory meaning, is a starting point for the Court in determining the scope of application of the statute. The problems and dangers incumbent with the use of legislative history to reach judicial decisions are well known and legion. In this case, committee reports are not always read by the members of Congress voting on the bill and are never voted on by Congress nor presented to the President, thereby arguably violating the non-delegation principle and usable only in limited circumstances to confirm understandings of the terms of a statute. *See, e.g.*, John F. Manning, *Textualism as a Non-Delegation Doctrine*, 97 Colum. L. Rev. 673 (1997), and Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 So. Cal. L. Rev. 845 (1992).

adequately and to deter future repetition of the prohibited conduct;" "Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss.") While Congress also implemented a series of limitations on punitive damage's awards in §1981a cases, 42 U.S.C. §1981a(b)(3), the statute further requires that "the court shall not inform the jury of the limitations described in subsection (b)(3) of this section." §1981a(c)(2). This strongly suggests that Congress intended the jury to be responsible for awarding punitive and compensatory damages in Title VII cases subject to post-verdict controls of the court to correct an errant jury verdict. The judge in a Title VII case has no more authority to replace the jury as a finder of fact than does a judge in any other case.

This Court has frequently made clear that no formulaic approach may be applied in assessing the appropriate level of punitive damages.[7] The Respondent's reading of the statute would do just that. Under its analysis, behavior which is intentional but not so egregious that it generates large compensatory damages would virtually never give rise to

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[7] "'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable [level of punitive damages] and the constitutionally unacceptable that would fit every case.' *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993), quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *accord BMW v. Gore*, 517 U.S. at 582-83; *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1718-19 (1998) ("Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.")

punitive damages. However, accomplishing the manifold purposes of the 1991 Act to give incentives to obey the civil rights laws and to eradicate discriminatory behavior in the workplace may require the award of punitive damages in cases of intentional, but not egregious, discrimination. Congress had already determined that this possibility was acceptable when it passed the Act into law using the language of mere intent.

3. The Circuit Court Majority's Standard of Egregiousness Also Conflicts With the Supreme Court's Prior Readings of Similar Punitive Damages and Civil Rights Caselaw.

The purpose expressed in the legislative history of §1981a was to bring damage awards available to victims of gender and religious discrimination into line with those in cases of intentional race discrimination under §1981a. Being aware of this history and with this purpose, the language gives a clear expression to the standards upon which punitive damage awards under §1981a are to be based and clearly rejects the use of an egregious behavior standard as was used in some of the case law on punitive damage awards, requiring instead a malice or reckless indifference standard. It would be erroneous for this Court to accept the Circuit Court majority's approach that these express terms are simply defined according to a prior common law interpretation of the standards for the application of punitive damages in civil rights cases. The Court must strive to define these terms consistent with their usage in other areas of law.

Both the Circuit Court's majority and dissent rely on cases discussing punitive damages in other areas of civil rights law, primarily *Smith v. Wade*, 461 U.S. 30 (1983), a 42

U.S.C. §1983 case, and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), an Age Discrimination in Employment Act case. Based on its reading of *Smith*, the Circuit Court majority would only allow punitive damages to reach the jury "where, for example, the evidence shows that the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite or malevolence, or otherwise evinced a 'criminal indifference to civil obligations.'" *Kolstad*, 139 F.3d at 965 *quoting Smith*, 461 U.S. at 41. The majority declined to rely on *Hazen Paper* because it dealt with a statute that differed in its damages provisions from §1981a. *Kolstad*, 139 F.3d at 966-67. On such grounds, the court should also have declined to rely upon *Smith*, since *Smith* was brought under 42 U.S.C. §1983, and §1983 has no punitive damages provision at all, leaving the court to decide the standards in which punitive damages can reach the jury on a common law basis.

In a statute the use of a term such as "punitive damages" imputes to that term the whole of any consistent common law or statutory meaning of the term. *Molzof v. United States*, 502 U.S. 301, 307 (1992). But this also enhances the importance of the legislature's modifications to phrases arising out of common law or statutory usage. Although the concept of punitive damages has a common law meaning and has been consistently interpreted by courts when it appears alone in a statute, it was consciously modified by the statutory language of §1981a.

In *Molzof*, the Court construed the meaning of the term "punitive damages" as used without modification in the Federal Tort Claims Act, 28 U.S.C. §2674. The Court noted that the common law definition of punitive damages is based upon the nature of the defendant's conduct, and not upon the

degree of harm to the plaintiff. *Id.* at 307.[8] The Court's opinion suggests that under the common law definition of punitive damages, either intentional or egregious misconduct is sufficient for an award to be considered punitive. *Id.* at 312 ("the damages are not punitive damages because their recoverability does not depend upon any proof that the defendant has engaged in intentional or egregious misconduct and their purpose is not to punish."). Thus, where, as in §1981a, modifying terms are used, and these terms imply intent rather than egregiousness, the standard for punitive damages under the statute must be recognized as one requiring little more than intent to disregard a known right, not the stringent egregiousness standard adopted by the Circuit Court.

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[8] *See also Smith*, 461 U.S. at 54:

> The focus is on the character of the tortfeasor's conduct - whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault.

Accord BMW v. Gore, 517 U.S. at 575 ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."); Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 387 (1994) ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.")

While the ordinary meaning of words in a statute is important, the words "malice" and "reckless indifference" are also terms of art with well-developed prior judicial constructions which must be considered as well. For example, the constitutional standards limiting common law recovery for defamation impose a malice requirement. "Actual malice" is established by proving that a publication was made knowing it to be false or with reckless disregard for whether or not it was false. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Eteenpain Co-op Soc. v. Lillback*, 18 F.2d 912, 917 (1st Cir. 1927). Far from implying personal animus against the subject of the defamation, it is sufficient to prove only an intentional publication of a knowing falsehood. Similarly, the "malice" standard employed by Congress in enacting §1981a should be construed to require only an intentional, knowing disregard of a federal right, and not actual animus against the claimant.

B. THE STANDARD OF PUNITIVE DAMAGES LIABILITY PROPOSED BY THE *EN BANC* CIRCUIT COURT DISSENT COMPORTS CLOSELY WITH THE STANDARDS AND PRACTICE OF TITLE VII EMPLOYER LIABILITY

Neither the heightened standard of egregiousness required by the Circuit Court majority nor the strictly intent-based approach proposed by the Petitioner is compatible with the language and application of Title VII. Title VII ordinarily provides liability only for the employer as an entity, and not for individual supervisors or fellow workers.[9] Employer liability

[9] "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each

in disparate treatment cases brought under Title VII is not based on the employer's intentional conduct, but is strictly applied without regard to fault where disparate treatment based on a protected status is established. Likewise, in the area of Title VII sexual harassment discrimination, strict liability is commonly imposed without regard to employer fault in the case of *quid pro quo* sexual harassment that results in tangible job detriment to the employee.[10] In hostile environment sexual harassment cases, courts have followed this

of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ." 42 U.S.C. Sec. 2000e(b)(1981). Courts generally construe this definition to impose liability only on the employer as an entity, and not on individual supervisors or other agents. *See, e.g., Tomka v. Seiler*, 66 F.3d 1295 (2d Cir. 1995); *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994). The Fifth Circuit has construed the term "agent" to include immediate supervisors when they are delegated the employer's traditional right of hiring and firing. *See Quijano v. Univ. Federal Credit Union*, 617 F.2d 129 (5th Cir. 1980); *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986). Even in that circuit, however, there is no Title VII liability "for the actions of mere co-workers." *Harvey v. Blake*, 913 F.3d 226, 228 (5th Cir. 1990).

[10] "There is little controversy regarding the effect of *quid pro quo* harassment by supervisors; in *quid pro quo* harassment cases, courts readily impose liability on the employer without regard to the agency issues." David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 Cornell L. Rev. 66, 71 n. 32 (1995); *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 496 (1997). *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997.) ("In cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct.") This rule was substantially adopted for cases involving quid pro quo retaliation, submission and/or tangible job detriments in the Court's last term in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

Court's directive in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986) and engaged in analyses of common law agency principles of liability to determine whether liability may be exposed.

Consequently, liability based on the intent of the employer alone cannot reflect the way that Title VII is actually applied in practice. In light of the extreme degree of flexibility built into the standard for employer liability in Title VII, particularly in the area of sexual harassment discrimination, any rule for punitive damages must also incorporate a high degree of flexibility dependent on the nexus between the employer-defendant and the authority of the wrongdoer. The Circuit Court dissent's view articulates well the rationale for this approach:

> Obviously, if the person discriminating is the same as the employer - in a sole proprietorship, for example- there is no difference between the employer's awareness of its legal obligations and the employee's. But where a gap exists in the agency relationship between the agent and the entity being held liable, *i.e.*, where the employee making the hiring or firing decision does not constitute the employer's entire decision-making apparatus, the punitive damages inquiry requires the jury to examine the employer's awareness of the law.

Kolstad, 139 F.3d at 973. Under this approach, an employer would be able to demonstrate that although it had been found liable for the discriminatory acts of an employee, it should not have to pay punitive damages because it had undertaken "good-faith efforts to comply with Title VII - for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and

using objective hiring and promotion standards - thereby demonstrating that it never acted in reckless disregard of federally protected rights." *Id.* Punitive damages liability should not arise otherwise, since Title VII itself requires no more than this of its employers. *Cf.* "Guidelines on Discrimination Because of Sex," Equal Employment Opportunity Commission, C.F.R. Sec. 1604.11(f) ("An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and develcping methods to sensitize all concerned.")

The Court's *amicus* believes that such a standard is appropriately applied to the type of disparate treatment case illustrated by the case at bar. This standard would not require a measure of egregiousness of conduct, which centers on effects to the victim, but would focus on the Respondent's state of mind and whether in pursuing the offending actions Respondent acted in haste under urgent business exigencies (i.e. a business justification exists) or was carrying out a responsibility which did not clash with the requirements of Title VII. In the latter case, a showing of intentional discrimination would be enough to meet the requirements of either "malice", defined above as deliberate indifference, or "reckless indifference" to the federally protected rights of the Petitioner. If the Respondents cannot show any business requirement for the offending conduct, nor any competing interests causing the conduct, and where it has been shown to have acted intentionally and with indifference to the rights of the Petitioner, the minimum standards for a showing of deliberate or reckless indifference have been met. Under

these conditions, the Respondent's conduct ought to be punishable by the imposition of punitive damages.[11]

IV. CONCLUSION

The question raised in this case is the proper interpretation of the terms "malice or reckless indifference" in 42 U.S.C. §1981a(b)(2), as applied to the claim of a plaintiff seeking punitive damages under Title VII. The Rutherford Institute submits that in this case, the statutory language must be given its full effect and not limited by common law concepts as to the meaning of the term punitive damages. The question of punitive damages should have rightly been put to the jury for determination, subject to the standard procedure for review for error by the judge and court of appeals.

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[11] An example of this type of approach taken by this Court is found in *Wilson v. Seiter*, 501 U.S. 294 (1991), an Eighth Amendment case brought by prisoners against prison officials. The Court required a showing by the prisoners of only deliberate indifference on the part of prison officials for an Eighth Amendment violation giving rise to punitive damages. 501 U.S. at 302. In the context of Eighth Amendment challenges to prison officials' conduct, *Whitley v. Albers* had previously held that offending conduct must be "wanton." 475 U.S. 312, 319 (1986). In *Wilson*, the Court contrasted cases of prison outbreaks where officials had to balance harm to prisoners with concerns for the safety of prison staff and other inmates. 501 U.S. at 302. The issue in *Wilson* was one of attending to the medical needs of inmates. In such a situation, the Court ruled that since these responsibilities do not normally clash with other equally important government responsibilities (*e.g.* quelling a violent outbreak), deliberate indifference constituted wantonness. *Id.* In these cases, wantonness of conduct does not depend on the conduct's effects on the prisoner, only the actor's state of mind. *See Wilson*, 501 U.S. at 303.

For the reasons set forth above, *amicus curiae* The Rutherford Institute respectfully suggests that the judgment of the *en banc* Circuit Court of Appeals be reversed and the case remanded to determine punitive damages.

Respectfully submitted,

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